Supreme Court, U. S.
FILED
AUG 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-297

JOHN J. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, WILLIAM J. KRISTJEN, MANAGER, CENTRAL NEWARK UNEMPLOYMENT INSURANCE CLAIMS OFFICE OF THE DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, AND JAMES A. WARE, ASSISTANT COMMISSIONER FOR INCOME SECURITY OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY,

Petitioners,

v.

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN J. DEGNAN,
Attorney General of New Jersey,
State House Annex,
Trenton, New Jersey 08625.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

MICHAEL S. BOKAR,
Deputy Attorney General,
On the Petition.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISION INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
1. Certiorari should be granted to resolve whether a plaintiff may be awarded counsel fees under the Civil Rights Attorney's Fees Awards Act despite the entry of judgment in favor of a state where challenged state regulations are revised after commencement of the action but no judicial determination has been made respecting the probable merit of the attack on the regulations in effect when the suit commenced	6
2. Counsel fees may not be awarded under §1988 to a plaintiff who incurs no actual legal expenses in view of the provision that fees may be allowed to the prevailing party "as part of the costs"	11
CONCLUSION	14
APPENDIX:	
A—Opinion and Judgment of the United States Court of Appeals for the Third Circuit	1a

PAGE

B—Oral Opinion of the United States District Court for the District of New Jersey 25a

C—Order of the United States District Court for the District of New Jersey 28a

D—Order of the United States District Court for the District of New Jersey 30a

Cases Cited

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 6-8, 11

Clanton v. Allied Chemical Corp., 409 F. Supp. 282 (E.D. Va. 1976) 8, 10

Hutto v. Finney, 437 U.S. 678 (1978) 11

Kahan v. Rosentiel, 424 F.2d 161 (3rd Cir. 1970) 9

Libby Welding Co., Inc. v. United States, 444 F. Supp. 987 (E.D. Pa. 1977) 9

Nadeau v. Helgemoe, 581 F.2d 275 (1978) 7, 8

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 12

Smith v. South Side Loan Co., 567 F.2d 306 (5th Cir. 1978) 11

Tobeluk v. Lind, 589 P.2d 873 (Alaska 1979) 9

Statutes Cited

Legal Services Corporation Act 12

Social Security Act 4

PAGE

15 U.S.C. (Truth-in-Lending Act):

Sec. 1640(a)(3) 11

28 U.S.C.:

Sec. 1254(1) 2

42 U.S.C.:

Sec. 1988 .....2, 3, 5-7, 12, 13

Sec. 2996 12

Sec. 2996f(b)(1) 12

Regulation Cited

45 C.F.R.:

Sec. 1609.3 12

Other Authority Cited

S.Rep. No. 94-1011, 94th Cong. 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Adm. News 5912 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

JOHN J. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, WILLIAM J. KRISTJEN, MANAGER, CENTRAL NEWARK UNEMPLOYMENT INSURANCE CLAIMS OFFICE OF THE DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, AND JAMES A. WARE, ASSISTANT COMMISSIONER FOR INCOME SECURITY OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY,

Petitioners,

v.

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review that portion of the judgment and opinion of the United States Court of Appeals for the Third Circuit entered May 25, 1979 which sets aside an order of the United States District Court for the District of New Jersey denying respondents' application for counsel fees and remands the matter to the district court "for further inquiry, in accordance with this opinion, into whether attorney's fees should be awarded and, if so, in what amount." (App. A at 16a).

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is appended to this petition as Appendix A. It is as yet unreported. The United States District Court for the District of New Jersey issued an oral opinion and order denying respondents' application for counsel fees. A transcript of the opinion dated July 17, 1978 appears as Appendix B to this petition, and the order entered July 28, 1978 appears as Appendix C.

Jurisdiction

The judgment and opinion of the Court of Appeals were filed on May 25, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1) to review a judgment of the Court of Appeals by writ of certiorari.

Questions Presented

1. Can a plaintiff be deemed a "prevailing party" under the Civil Rights Attorney's Fees Award Act of 1976

and counsel fees be awarded against a state where judgment is entered in the state's favor upholding the validity of administrative regulations as revised after commencement of the action and there is no judicial finding of probable merit in the challenge to the regulations as they stood at the time the lawsuit commenced?

2. Does the 1976 act's authorization of counsel fee awards to the prevailing party "as part of the costs" permit an award to a plaintiff who is represented by a legal services organization and thus incurs no actual legal expenses?

Statutory Provision Involved

42 U.S.C. §1988 provides in pertinent part:

> ". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Statement of the Case

This action was filed June 3, 1974 in the United States District Court for the District of New Jersey against the Commissioner of the New Jersey Department of Labor

and Industry.* The complaint demanded a declaratory judgment and injunction invaliding the regulations and procedures followed by the Department in cases resulting in the suspension, termination or reduction of unemployment benefit payments to claimants alleged to have obtained benefits through fraudulent concealment of employment. These procedures were alleged to be inconsistent in various respects with federal statutory and constitutional requirements. The case was certified as a class action by order dated January 27, 1976.

Subequent to the filing of the complaint, the Department began to implement substantial revisions in the fraud procedures. The revised procedures were first set forth in an administrative directive effective September 23, 1974, were later published as regulations in May 1975, and were thereafter revised in various particulars. The case was tried without a jury in January and February 1977. Judge Barlow concluded that the regulations and procedures comport with the "payment when due" and "fair hearing" requirements of the Social Security Act provisions applicable to state unemployment compensation programs as well as with the due process and double jeopardy provisions of the Constitution.

Final judgment was entered in favor of the State on May 24, 1978 (App. D). Respondents' attorney, Bergen County Legal Services, subsequently moved the court for an order awarding respondents court costs and counsel fees. An order denying the motion was entered July 28, 1978 (App. C).

The Court of Appeals affirmed the judgment of the district court in all respects on the merits of the constitu-

---

* By order dated June 18, 1975 District Judge George Barlow granted respondents leave to file an amended complaint adding an additional plaintiff and two additional defendants.

tional and statutory challenges to the revised regulations. But it vacated the order denying counsel fees and remanded this issue to the district court to determine whether fees should be awarded respondents under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, in accordance with the principles enunciated in its opinion and, if so, in what amount (App. A at 16a). The court held that where, as it found to be the case here, "the chronology of events strongly suggests" a causal relationship between the filing of an action and the defendant's subsequent implementation of changes in challenged laws or procedures, a district court "must conduct an inquiry to determine whether the lawsuit was the catalyst for the implementation of all or any of the reform measures." *Id.* at 15a. Hence in this case, said the court, "If the new procedures, which provided much of the relief appellants had initially sought, were implemented as a result of this lawsuit, the appellants were prevailing parties with respect to a portion of their claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims." *Ibid.* (parentheses by the court).

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to resolve whether a plaintiff may be awarded counsel fees under the Civil Rights Attorney's Fees Awards Act despite the entry of judgment in favor of a state where challenged state regulations are revised after commencement of the action but no judicial determination has been made respecting the probable merit of the attack on the regulations in effect when the suit commenced.

This case presents substantial issues not previous considered by the Court relating to counsel fee awards to plaintiffs under the Civil Rights Attorney's Fees Awards Act of 1976 and similar provisions of other federal laws. The Court of Appeals, in remanding the fee question, directs the district court to consider the issue in light of principles that may well result in a substantial fee award against the State despite the fact that those principles, in several crucial respects, are inconsistent with the intent of Congress as expressed in the language and history of 42 U.S.C. §1988. The effect of the court's misinterpretation is heightened by the fact that the party that would ultimately pay an award in this case is a state. As in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), which concerned the converse question of the circumstances in which a defendant may be deemed a prevailing party, the principal issue here is one "about which the federal courts have expressed divergent views." 434 U.S. at 414. The Court of Appeals' opinion is also inconsistent with language in *Christiansburg* that, like decisions in other circuits, makes clear that for a plaintiff to be deemed "prevailing" there must be a judicial finding of merit or probable merit of claims upon which a counsel fee application under the act is based.

In *Christiansburg,* which considered the virtually identical counsel fee provision of Title VII of the Civil Rights Act of 1964, the Court observed that ". . . when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against *a violator of federal law.*" 434 U.S. at 418 (emphasis added). A little later on, the Court, quoting a sponsor of the fact, notes that ". . . the fee provision was included to 'make it easier for a plaintiff of limited means to bring *a meritorious suit.*'" *Id.* at 420-421 (emphasis added). Similarly, the Senate report to the bill eventually enacted as §1988 summarizes a line of cases under the 1964 act by observing that ". . . for purposes of the award of counsel fees, parties may be considered to have prevailed when they *vindicate rights* through a consent judgment or without formally obtaining relief." S.Rep. No. 94-1011, 94th Cong. 2d Sess. 5, reprinted in [1976] U.S. Code Cong. & Adm. News 5912 (emphasis added).

The Court of Appeal's opinion is also inconsistent with that of the First Circuit in *Nadeau* v. *Helgemoe,* 581 F.2d 275 (1978). There the court in an earlier opinion affirmed the district court on the issue of prisoners' access to law libraries but reversed and remanded on other constitutional issues related to the conditions of confinement. Following the remand the parties entered into a consent decree in which the defendant prison officials agreed to many of the changes in confinement conditions sought in the complaint. The district court denied the plaintiffs' application for counsel fees under §1988 and they appealed on the ground they were the prevailing party. The Court of Appeals held that the plaintiffs were entitled to a fee for their success on the law library issue but again remanded the case to the district court to determine whether they were "prevailing" on the prison conditions question by vir-

tue of the defendants' agreement to the consent order. The court recognized that it would be difficult for the district court to ". . . meaningfully decide the legal requirements that govern defendants' conduct without conducting the very trial the consent decree was signed to avoid." 581 F.2d at 281. But the court held such an inquiry to be required under §1988, and observed that the district judge had "sufficient exposure to the facts and law of this case" to resolve the issue. *Ibid.**

Similarly, in *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976), a discrimination complaint was resolved by a settlement agreement that accorded the plaintiffs most of the relief requested in the complaint but included an express denial of liability by the defendant company. The plaintiffs moved for counsel fees under Title VII on the ground that they had attained the major aims of the litigation through the agreement. The court held that in the absence of an admission of liability such agreements cannot be considered on their face as a concession of the probable merit of the plaintiff's legal claims, observing that a defendant's assent to such a settlement may well be attributable to other motivations such as ". . . the elimination of the costs of trial,

* For some inexplicable reason, the court went on to adopt as the standard to govern the district court's inquiry the stringent test articulated by the Court in *Christiansburg* for determining whether a *defendant* may be deemed prevailing, *i.e*, whether the plaintiff's claim "was frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so." *Ibid.* It is difficult to perceive the relevance of this test to the issue of whether a *plaintiff* is a prevailing party. In cases where a plaintiff's claims are settled before trial or, as here, are in effect rendered moot by a state defendant's alteration of the challenged law, a more realistic standard would be the "probable success" test applicable to preliminary injunctions and stays.

the elimination of adverse publicity, the elimination of the risk of loss at trial even if the risk is slim, etc." 400 F. Supp. at 284. It therefore held that, absent a settlement of the counsel fee issue or the filing of an agreed stipulation of facts, an evidentiary hearing would be required to determine "which party has the more meritorious position" on the discrimination claim. *Id.* at 285. (The issue was subsequently settled when the defendant agreed to pay attorney's fees in an amount deemed reasonable by the court. 416 F.Supp. 39 (1976).) *Accord, Libby Welding Co., Inc.* v. *United States,* 444 F.Supp. 987, 986 (E.D. Pa. 1977); *Tobeluk* v. *Lind,* 589 P.2d 873,880 (Alaska 1979) ("An essential requisite to an award of attorney's fees under §1988 appears to be that the claim be meritorious. . . .A merit determination is important not only because it relates to the question whether plaintiff was the prevailing party, but also because it is needed to determine whether the public interest . . . has been advanced.")

Indeed, the Court of Appeals' opinion conflicts with the rationale of one of its own earlier decisions. In *Kahan* v. *Rosentiel,* 424 F.2d 161 (3rd Cir. 1970) the court, in considering a counsel fee award under the fund-in-court doctrine, said:

> "In order to recover attorney's fees, it is not necessary that suit be brought to successful completion since such requirement might discourage prompt settlements. . . ."
>
> "*It is necessary to determine, however, that where a suit is filed it is 'meritorious'* and that it is the plaintiff's effort which caused others to benefit. . . ." 424 F.2d at 167 (emphasis added, citations omitted).

The Court of Appeals thus erred in holding that the district court may award fees against the State solely on a

finding that respondents' suit was the "catalyst" for the revisions in the original regulations. Even if the district court were to find such a causal connection, this would in no manner be tantamount to finding that the changes were implemented because the State concluded the original procedures were constitutionally or otherwise infirm. There are, as noted by the court in *Clanton, supra,* many reasons other than a recognition of the force of a plaintiff's legal contentions why a defendant may elect to settle a case before trial or, as here, alter challenged procedures. To the reasons set forth in the above quotation from *Clanton* might be added, in the present context, a recognition by the State that the suggested changes would indeed represent an improvement over the existing procedures and would entail no significant administrative or fiscal burden to implement. But insofar as the Court of Appeals, in holding that a §1988 award may be predicated solely on the presence of a causal relation between the filing of a suit and subsequent concessions by the defendant, assumes that such a response is tantamount to an admission of invalidity of the defendant's prior conduct, the assumption does not square with practical reality. To deem a plaintiff a prevailing party in this situation without more—without an inquiry into the merit of his claims—is to ignore the intent of Congress as manifested in the language and history of §1988 and the unanimous conclusion to the contrary expressed in the decisions in other circuits that have had occasion to address the point.

Because the opinion of the Court of Appeals misinterprets the requirements for imposition of counsel fees against states and individual defendants under §1988, and because the opinion both conflicts with decisions in other circuits and appears inconsistent with this Court's decision in *Christiansburg,* certiorari should be granted to resolve this important question affecting the administration of §1988 and, indirectly, the substantially similar counsel fee provisions of other federal laws.

2. Counsel fees may not be awarded under §1988 to a plaintiff who incurs no actual legal expenses in view of the provision that fees may be allowed to the prevailing party "as part of the costs."

Section 1988 permits a court to "allow the prevailing *party* . . . a reasonable attorney's fee *as part of the costs.*" (Emphasis added). The inclusion of §1988 counsel fees as part of the litigation costs incurred by the successful party serves to distinguish §1988 from counsel fee provisions of other statutes. Compare *e.g.* 15 U.S.C. §1640(a)(3) (delinquent creditor liable under Truth-in-Lending Act for "the costs of the action, *together with* a reasonable attorney's fee as determined by the court."). The Court, quoting from the legislative history of §1988, recently noted in *Hutto* v. *Finney,* 437 U.S. 678, 694 (1978) that the designation of counsel fees as part of costs renders them collectible "like other items of costs." A §1988 fee award, like the taxation of other costs, ". . . does not compensate the plaintiff for the injury that first brought him into court. Instead, the award *reimburses* him for a portion of *the expenses he incurred* in seeking prospective relief." 437 U.S. at 695 n.24 (emphasis added). Such awards serve the "limited" function of ". . . *partially compensating a successful litigant for the expense of his suit. . . .*" *Id.* at 697 n.27 (emphasis added). And like other litigation costs, §1988 counsel fee awards are the entitlement of the prevailing *party,* not his attorney. *Cf. Smith* v. *South Side Loan Co.,* 567 F.2d 306, 307 (5th Cir. 1978).

Here, respondents have been represented throughout this litigation without charge by Bergen County Legal Services, a nonprofit organization funded by the federal Legal Services Corporation. 42 U.S.C. §2996 *et seq.* Respondents have thus "incurred" no legal "expenses" for which they may seek to be "reimbursed" or "partially compensated" as part of their litigation "costs." The denial of §1988 counsel fees to plaintiffs represented without charge is consistent not only with its language but with the primary purpose of provisions of this kind. That purpose, as observed by the Court in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968), is to encourage those whose civil rights are violated to act "as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." The Congressional concern was that "If successful plaintiffs were routinely forced to bear their own attorney's fees, *few aggrieved parties would be in a position to advance the public interest* by invoking the injunctive power of the federal courts." *Ibid.* (emphasis added).

There is nothing in this record to suggest that these respondents, or persons of limited means in general, would suffer any disadvantage whatever from a rule barring §1988 counsel fee awards to plaintiffs represented without charge. There is nothing to suggest that Bergen County Legal Services would have declined to represent respondents if the possibility of its recovering all or part of the costs of representation were precluded. Indeed, the Legal Services Corporation Act and implementing regulations explicitly discourage funded organizations from accepting potential fee-generating cases; applicants may be represented in such cases only where adequate representation is otherwise unavailable. 42 U.S.C. §2996f(b)(1); 45 C.F.R. §1609.3. Hence the ability of impecunious

persons to secure legal services representation in civil rights cases would not be affected by a rule precluding §1988 fee awards to plaintiffs represented by such organizations but would, if anything, be enhanced by the recognition of such cases as non-fee-generating.

Because the opinion of the Court of Appeals permits the district court to award fees to parties who have incurred no actual legal expenses contrary to the language and purposes of §1988, certiorari should be granted to consider this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for Petitioners, John J. Horn, Commissioner, Department of Labor and Industry, Division of Employment Security, William J. Kristjen, Manager, Central Newark Unemployment Insurance Claims Office of the Division of Unemployment and Disability Insurance of the Department of Labor and Industry, and James A. Ware, Assistant Commissioner, Income Security of the Department of Labor and Industry, State of New Jersey,
By: MICHAEL S. BOKAR,
Deputy Attorney General.

APPENDIX A

Opinion and Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2260

ANNA Ross, et al.,

Plaintiffs-Appellants,

v.

JOHN HORN, Commissioner Division of Employment Security, Department of Labor and Industry of the State of New Jersey, et al.,

Defendants-Appellees.

ON APPEAL FROM FINAL JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. Civil No. 74-0818)

Submitted Under Local Rule 12(6)
March 20, 1979

[1a]

Appendix A

Before:

GIBBONS, HIGGINBOTHAM, *Circuit Judges,* and
MARKEY*, Chief Judge, United States Court of
Customs and Patent Appeals

(Filed—May 25, 1979)

RICHARD S. SEMEL, ESQUIRE
47 Essex Street
Hackensack, New Jersey 07601
Attorney for Plaintiffs-Appellants

JOHN J. DEGNAN, ESQUIRE
Attorney General of New Jersey

STEPHEN SKILLMAN, ESQUIRE
Assistant Attorney General
Of Counsel

MICHAEL S. POKAR, ESQUIRE
Deputy Attorney General
On the Brief
State House Annex
Trenton, New Jersey 08625
Attorneys for Defendants-Appellees

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., Circuit Judge

A tension exists, in the administration of public welfare or benefit programs, between the need to guarantee the

* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, Washington, D. C., sitting by designation.

Appendix A

fair handling of each individual's claim and the need to efficiently monitor such programs to minimize fraudulent and otherwise improper claims. This case presents the issue of whether the procedures utilized by the New Jersey Department of Labor and Industry to prevent fraud in the receipt of unemployment benefits adequately protect the interests of those claiming entitlement to unemployment compensation funds. We must also decide whether a plaintiff is entitled to counsel fees where procedures have been changed subsequent to the filing of the plaintiff's lawsuit, but when there has been no formal judgment or settlement decree mandating such changes.

More specifically, appellants in this class action[1] Order of January 27, 1976, Appellants' Appendix, p. 28, contend that the procedures utilized by the Division of Employment Security of the New Jersey Department of Labor and Industry in the processing of suspected unemployment fraud ("wage-benefit conflict") cases violate the "fair hearing" and "when due" provisions of 42

[1] The following class was certified:

(1) all of those persons whose applications for Unemployment Compensation benefits have been "pended" or have otherwise not been acted upon, because they are suspected of, accused of, or indicted for, but not convicted for receiving unemployment compensation benefits fraudulently, or by means of false representations, and (2) all appplicants for unemplyoment compensation benefits who have been disqualified for the receipt of such benefits until they make full restitution of the alleged overpayments and criminal action instituted by the Division of Employment Security has been completed.

Appendix A

U.S.C. Section 503(a)[2] as well as the due process clause of the Fourteenth Amendment.[3] The district court found no such violations and entered judgment for the appellees. Appellants were also denied counsel fees. We affirm the entry of judgment in favor of appellees but remand for a re-determination of the counsel fees issue.

1. The Challenged Procedures

The following background to these proceedings was succinctly set forth by the court below:

---

[2] The relevant portions of Section 503(a) provide:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provision for—
>
> (1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, any compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due; and
>
> * * *
>
> (3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied;

[3] Appellants had argued below that the challenged procedures violate the double jeopardy clause of the Fifth Amendment. They have not pressed this argument on appeal.

Appendix A

New Jersey participates in the jointly-funded federal-state unemployment compensation program established by Title III of the Social Security Act, 42 U.S.C. § 501, *et seq.* The unemployment compensation law in New Jersey, N.J. Stat. Ann. 43:-21-1, *et seq.*, is administered by the Division of Employment Security of the Department of Labor and Industry, represented by the defendant Horn.

* * *

The Bureau of Unemployment and Disability Insurance Programs in the New Jersey Department of Labor and Industry is responsible for developing and implementing programs, procedures, and instructions for the forty-one (41) local unemployment claims offices throughout the State and appraising the quality of the operation of those offices. Various manuals have been prepared by the Bureau setting forth the procedures to be followed by the local offices, and so-called administrative instructions are issued to the office managers from time to time in order to supplement or update the information in the manuals. Similar directives are issued to the head of the Department's Fraud Inspection Section. Both the local offices and the latter Section are bound by such directives.

To file a claim for unemployment benefits, an individual must report in person to a local office, where an application for benefits is filled out which, among other things, warns him that he is subject to certain penalties for any misrepresentation. The initial application is processed through a computer

and a writeen request for wage and separation information respecting the claimant is mailed to the responsible employer. When he reports back to the local office fourteen (14) to twenty-one (21) days after the filing of the claim, the claimant is given a written determination as to his eligibility for benefits and, if found eligible, is advised of his maximum benefit amount and weekly benefit rate. At that time, the claimant receives his first benefit check upon signing a pay order, which, like the claim application, contains a warning as to the consequences of a misstatement. He continues to report to the local office and receive his benefit checks on a bi-weekly basis. If his eligibility for benefits is called into question, a hearing is held, and if the decision is adverse to the claimant he is entitled to a plenary *de novo* hearing before the Appeal Tribunal, with a further right of appeal to the Board of Review and the New Jersey courts. The same right of administrative and judicial review exists in the case of decisions rendered by the Fraud Inspection.

Instances of suspected unemployment fraud, or so-called wage-benefit conflicts, come to the attention of the Department of Labor and Industry by various means. The responsible employer is furnished monthly with a statement showing the benefits paid to the claimant; if the employer, upon matching the statement against its payroll records, finds that the claimant was employed during weeks for which he was paid benefits, this is brought to the attention of the Department. The Department also submits a list of all claimants and

their benefit payment records on a quarterly basis to the Social Security Administration, where the information is cross-matched against any payroll data received by the federal agency for the same period; upon being advised of a possible wage-benefit conflict by this means, a Form B-98B, Claimant's Benefit Payment and Employment Record (D-1 in evidence) is forwarded to the employer requesting information on the claimant's employment, if any, during the period in question. Also, information respecting a possible wage-benefit conflict may be supplied the claimant himself, and periodic agency audits of payroll records in industries where there appears to be a high incidence of unemployment fraud.

Ross v. *Horn*, No. 74-818 (D.N.J. May 23, 1978), Appellants' Appendix, pp. 40-42.

At the time the complaint in this action was filed, New Jersey's procedures with respect to those suspected of having wage-benefit conflicts varied according to the seriousness of the suspected violations. In the more serious cases, where criminal prosecution was contemplated, a claimant was sent a notice requesting his appearance at a hearing so that he might show cause why his unemployment benefits should not be suspended. If, after the hearing, a wage-benefit conflict was found, the claimant was notified that his case would be referred for criminal prosecution and that any future payments owed the claimant would be suspended pending disposition of the criminal case. In less serious cases, a claimant received no hearing, but was sent a Determination and Demand for Refund or Unemployment Benefits. Pur-

suant to an unwritten policy, applications by persons suspected of wage-benefit conflicts were not acted upon until criminal action was either decided against or completed.

Shortly after this case was filed, new procedures were implemented whereby all claimants suspected of wage-benefit conflicts were given an opportunity to be heard prior to a termination of their benefits. These new procedures have evolved somewhat since their initial implementation. The following are the procedures mandated by the most recent regulations and Administrative Instructions.

Local unemployment insurance claims offices are to schedule hearings "as soon as possible, but no later than 30 days" after they have been notified by the Fraud Inspection Section of the Department of Labor and Industry's Bureau of Payment Control that a wage-benefit conflict may exist. Appellants' Appendix, p. 87. Notice is then sent to the claimant informing him that evidence has been received that he was employed for a specified period during which he received unemployment benefits, that he may be subject, as a result, to specified consequences, and requesting that he report for a fact-finding interview at a given time and date. The notice informs the claimant that he has "the right to representation and witnesses," that he should bring any evidence he has to support his claim, and that the local office must be notified if he cannot attend the interview. In the less serious or "non-criminal" cases, the interview is conducted by a claims examiner in the local office. In the more serious cases, the interview is conducted by investigators in the Fraud Inspection Section. In both

cases, the claimant is told that information has been received indicating that he received benefits for periods during which he was employed and is shown a form which reveals the basis for the allegations. The claimant is given an opportunity to rebut the allegations. The examiner prepares a summary of the claimant's statements which the claimant is asked to sign. In the more serious cases, claimants are advised of their privilege against self-incrimination and their right to representation by counsel.

The relevant information is then sent to the Inspection Section along with a suggestion as to whether further investigation is warranted. That Section then makes a determination as to whether there was in fact a wage-benefit conflict. If a wage-benefit conflict is found, a form entitled "Determination and Demand for Refund of Unemployment Benefits and Imposition of Penalty and Disqualification Because of Conflicting Wages" is sent to the claimant. This Determination and Demand informs the claimant that, under New Jersey's Unemployment Compensation Law, he is disqualified for benefits for a 17-week period and that the maximum amount of benefits the claimant can receive is reduced by 17 times the weekly amount of improper benefits received. The claimant is requested to repay the improperly received benefits and to pay a statutorily imposed fine. The claimant is also informed that he has a right of appeal which must be exercised within a week. If an appeal is filed, the claimant is entitled to a plenary *de novo* evidentiary hearing and can appeal from there to a Board of Review and then to the Appellate Division of the New Jersey Superior Court.

According to the court below, claimants whose applications had been "pended" or not acted upon pursuant to

the old procedures and who had not received a hearing were given an opportunity to be heard in accordance with the new procedures just described. Named plaintiffs Ross and Norkett have received interviews and determinations and have pursued their claims in state proceedings. The status of named plaintiff Thomas is less clear. At trial, the testimony of state officials indicated that his application for benefits had not been acted upon pending the resolution of a criminal investigation against him arising out of alleged wage-benefit conflicts. The failure to act on this application apparently was the result of confusion among the state unemployment officials as to the application of new procedures to old cases. The testimony also indicated that action will now be taken on these old cases according to the new procedures, although it is not clear that a firm policy has emerged. Testimony of Kristjen, T-80; Testimony of Graziano, T-121. In affirming the judgment here we assume, on the basis of this testimony, as the district court apparently did, that the new procedures will be applied to all those whose current applications have not been acted upon because of alleged prior wage-benefit conflicts.

2. Challenges to the Present Procedures

Appellants argue that the procedures currently employed are defective in an number of respects. They argue that due process standards are not met in that:

1. The claimant cannot confront witnesses at the pre-determination interview.
2. The pre-determination interview is not always conducted by impartial decisionmakers.

3. The decisions ultimately rendered via the Determination and Demand form are inadequate because no evidentiary support or reasons for the decision are given.
4. The notice of the pre-determination interview sent to claimants is inadequate.
5. The regulations do not contain adequate provision for the service of the notice.
6. The hearing examiners are not adequately trained or given adequate guidelines for conducting the interviews.

We begin our analysis by noting that appellants certainly have a property right in receiving unemployment benefits to which they are entitled by statute. *See, e.g., Matthews* v. *Eldridge,* 319, 332 (1976). Thus it is clear that they may not be deprived of this right without due process.

We are therefore confronted with the question of what the elusive concept of "due process" demands in these circumstances.[4] Appellants' contentions are largely premised on the notion that they are entitled to a full pre-determination evidentiary hearing. We reject this premise.

a. *Entitlement to Pre-determination Evidentiary Hearing*

In *Matthews* v. *Eldridge,* 424 U.S. at 335, the Supreme Court set forth the following three factors to be consid-

[4] We assume here that the requirements of due process and those of the "fair hearing" provision of 42 U.S.C. § 403(a) are coextensive. Therefore, we will not analyze separately these statutory and constitutional standards.

ered in determining what due process requires in a specific circumstance:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Court there analyzed those three factors and determined that H.E.W.'s procedures for terminating disability benefits were adequate. Those procedures provided for a pre-determination interview, but no full pre-determination evidentiary hearing.

This court faced a similar issue in *Mattern* v. *Matthews,* 582 F.2d 248 (3d Cir. 1978), *petition for cert. filed,* 47 U.S.L.W. 3446 (January 2, 1979), where H.E.W.'s procedures for recoupment of alleged overpayments under Section 204 of the Social Security Act, 42 U.S.C. § 404, were scrutinized.[5]

We held that pre-recoupment hearings were not generally required, but that, where the claimant opposed recoupment on the basis of Section 204(b), 42 U.S.C. § 404 (b), which precludes recoupment where the beneficiary is without fault and the recoupment would defeat the pur-

[5] An essentially identical issue was raised and result reached in *Elliot* v. *Weinberger,* 564 F.2d 1219 (9th Cir. 1977), *cert. granted,* 47 U.S.L.W. 3221 (October 3, 1978).

pose of Title II of the Act or would be "against equity and good conscience," an informal hearing with certain prescribed minimum safeguards must be provided prior to recoupment.

In considering the situation here in light of the three factors identified in *Matthews* v. *Eldridge,* it is helpful to refer to the application of those facts in *Eldridge* and in *Mattern,* and to *Goldberg* v. *Kelly,* 397 U.S. 254 (1969), the seminal case applying procedural due process guarantees to the modern welfare system.

The first factor to be considered is the private interest that will be affected by the official action. In *Goldberg,* where the termination of benefits under the Aid to Families with Dependant Children (AFDC) program are under New York State's Home Relief program was involved, the Court emphasized that "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources his situation becomes immeditaely desperate." 397 U.S. at 264. In *Eldridge,* it was noted that, since eligibility for disablity benefits is not based upon financial need and other government benefits may be available if disability benefits are terminated, "[t]he potential deprivation here is generally likely to be less than in *Goldberg,* although the degree of difference can be overstated." 424 U.S. at 341.[6] The court in *Mattern* determined that the effect on private interests was greater than that in *Eldridge* be-

[6] The Court in *Eldridge* also analyzed in this regard the length of time ordinarily required before improperly denied benefits were reinstated. The record here does not provide meaningful evidence on this point.

cause the amount of benefits received was generally affected by need and that need was a particularly important factor in 204(b) determinations. The effect was found to be less than that in *Goldberg,* however, because "[t]he victims of erroneous recoupment, like the claimant in *Eldridge,* generally have resort to welfare and other benefits." 582 F.2d at 255. The private interest here most closely approximates that in *Eldridge* especially since unemployment compensation benefits are not necessarily need-based.

Next to be considered is the risk of erroneous deprivation of the claimant's interest through the procedures currently used and the probable value of additional or substitute safeguards. In analyzing this factor, primary attention has been focused on the type of determination that must be made and the type of evidence necessary to make that determination. In *Eldridge,* the court concluded that since disability determinations are largely based upon medical reports by physician specialists there is little need to inquire into credibility and therefore decisions can be adequately made on the basis of documentary submissions. The *Eldridge* court contrasted the circumstances there with those in *Goldberg* where credibility was an important factor and where the claimants could not be expected to communicate effectively through written submissions. In *Mattern,* the recoupment decisions generally involved arithmetic computations and document-based decisions were considered adequate. Where a 204(b) claim was made, however, and therefore issues of "fault, financial dependence and detrimental reliance" were involved, the resolution of credibility questions looms large and therefore evidence is not "well suited to valuation in written form. . . ." 582 F.2d at 256.

Again, the situation here is closest to that in *Eldridge.* As described in the portion of the district court opinion quoted above, wage-benefit conflicts are generally brought to light as a result of the comparison of benefit payment records with payroll data received from Social Security Administrators or with employers' payroll records. Thus the proof of wage-benefit conflicts is largely in documentary form. Of course, evidence may come from other sources and credibility determinations may be involved where claimants deny that they were employed to the extent indicated by the Social Security Administration's or the employer's records. As the Court stated in *Eldridge,* however, "To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344.

This case is also similar to *Eldridge* in that there are existing procedures whereby the claimant is told of the information upon which adverse action may be based and is given an opportunity to respond to that information. In *Eldridge,* claimants had full access to all information relied upon by the state agency and claimants were informed in writing of the state agency's tentative assessment prior to the determination of benefits, and were given a summary of the reasons and evidence supporting that assessment. The claimant was then given the opportunity through written submission to rebut this evidence or present additional evidence. Here, claimants received an *oral and written* summary of the information upon which a conflict was suspected and given the opportunity to submit documentary evidence, orally rebut the

claim of conflict and present live testimony. Although complete access to agency files is apparently not permitted, the oral explanation and opportunity for oral rebuttal make the procedures here probably better calculated to protect claimants' rights than those in *Eldridge*. In *Mattern,* no oral hearing prior to recoupment was provided. After claimants received notice of the proposed recoupment and the reasons therefor, they had thirty days to ask for reconsideration of a "waiver" under Section 204(b). In *Graves* v. *Meystrick,* 425 F.Supp. 40 (E.D. Mo.) (3 judge court), *aff'd without opinion,* 431 U.S. 910 (1977), Missouri's unemployment insurance program procedures under which eligibility was determined on a week-by-week basis were upheld. The three-judge court emphasized that "the risk of erroneous deprivation is minimized by the notice and interview procedure [similar to that used here] which affords the claimant an immediate opportunity to correct an erroneous denial of benefits." 425 F.Supp. at 48.[7]

The last factor listed for consideration in *Eldridge* is "the Government's interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. The Court in *Eldridge* referred to the "incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision." *Id.* at 347. Although no specific calculation of the increased cost was made,

[7] We recognize that the Supreme Court's summary affirmance of *Graves* does not indicate that the Court has adopted the language or reasoning of the lower court. See *Fusari* v. *Steinberg,* 419 U.S. 379, 391-921 (1975) (Burger, C.J., concurring).

the Court concluded that "the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Id.* In *Mattern,* we concluded that the government's interest was somewhat less substantial than that in *Eldridge* since, in *Eldridge,* the government "faced a substantial risk of paying benefits to an ineligible recipient without hope of recovering these funds. In contrast, the hearing we are considering is to determine whether the Secretary will be permitted to recoup an overpayment by deducting the amount from a continuing stream of benefits being paid to a concededly eligible recipient." 582 F.2d at 257. In the wage-benefit conflict context, there will generally not be a "continuing stream of benefits" flowing to "a concededly eligible recipient" from which any over-payments may be recovered.

Thus, an analysis of the three factors set forth in *Eldridge* reveals that the salient features of the procedures here most resemble those of *Eldridge* and the non-204(b) cases in *Mattern.* Most significantly, the suitability of wage-benefit conflict claims to resolution by documentary evidence, coupled with the opportunity for oral or written rebuttal of this evidence prior to the initial determination as to the existence of this conflict, convinces us that a pre-determination full evidentiary hearing is not required in this context. We repeat that such a full *de novo* evidentiary hearing is available, as of right, after the initial determination is made.

b. *Other Due Process Challenges*

Having concluded that plenary pre-determination hearings are not required, we also conclude that the pre-determination interview process is not rendered defective

as a result of the state's refusal to allow claimants to confront witnesses against them at the interview or as a result of the state's sometimes using an interviewer who had previously participated in the investigation of the alleged conflict. We note that New Jersey's practice is that the interviewer not have prior involvement in the claimant's case. The rights to an impartial decision-maker and to confront witnesses are generally recognized where a plenary hearing is required. Since a plenary hearing is not required at the pre-determination stage and since these rights are conferred as a subsequent plenary hearing, the absence of those safeguards at the interview is not a violation of due process. Similarly, although the form in which a claimant is notified of the determination with respect to an alleged work-benefit conflict does not contain the type of statement of reasons generally required for decisions after a plenary hearing, we hold that the form is adequate in the context of the procedures utilized here. We base this conclusion on the fact that the form does give a specific statement of the dates of the purported conflicts, the amounts of overpayment, the consequences of the conflict with respect to the fines, recoupment and diminishment of future benefits, and the means by which the determination may be challenged. Also, a more complete statement of reasons is given should the claimant exercise his right to the plenary post-determination hearing.

Appellants contend that the initial notice of inquiry into the alleged conflict is inadequate in numerous respects especially in that no statement of consequences of the alleged conflict or of the factual basis for the allegations is given. The form of notice now in use informs claimants that they may be subject, specified under New Jersey statutes, to refund, disqualification, fines and/or prosecution. The factual basis for the allegations is revealed at the in-

terview. Appellants also argue that the service of this notice is inadequate in that the claimant is presumed to have received the notice which is sent by regular mail unless the notice is returned by the post office. We conclude that neither the initial notice, nor the procedures for serving that notice run afoul of statutory or constitutional standards. Finally, we conclude that appellants have not established that the interview guidelines or the training of the interviewers is so inadequate as to constitute a violation of due process. Therefore we hold that the procedures challenged here are in accordance with the mandates of "due process" and the statutory requirement of a "fair hearing."

c. *The "When Due" Requirement*

We hold also that the procedures here do not violate 42 U.S.C. § 503(a)(1) which requires that a state's method of administration be "reasonably calculated to insure full payment of unemployment compensation when due."[8] "The basic thrust of the statutory 'when due' requirement is timeliness." *Fusari* v. *Steinberg*, 419 U.S. 379, 388 (1975) (footnote omitted). Appellants have not argued that the appeal process here involves an undue length of time. They argue instead that the "when due" requirement, as construed in *California Department of Human Resources Development*, 402 U.S. 121 (1971), mandates procedural protections not provided here.

In *Java*, the Court held that California's unemployment compensation program violated the "when due" provision in that the benefits of a claimant determined to be eligible

[8] For the complete text of this provision, see note 2, *supra*.

were automatically suspended when an employer appealed that determination. Here no automatic suspension of benefits is involved. Instead, the determination of a wage-benefit conflict and the consequences of such a determination occur only after the procedures already described have been followed. We conclude that the procedures here have not been shown to be less than reasonably calculated to insure compensation "when due" and that therefore, the "when due" provision of § 503 does not require the use of additional procedural safeguards.

3. Attorney's Fees

42 U.S.C.A. Section 1988 (Supp. Pamph. 1977) provides that in an action under 42 U.S.C. Section 1983 and certain other provisions, "the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs." After a hearing, the court below denied appellants attorney's fees. Appellants argue that they are prevailing parties despite the fact that judgment was entered against them because the changes in New Jersey's wage-benefit conflict procedures first issued in 1974 were a direct result of this law suit. Appellees recognize that attorney's fees may be awarded to a party even though no judgment has been entered in that party's favor. *See, Gagne v. Maher,* —— F.2d —— (2d Cir. March 9, 1979); *Nadeau* v. *Helgemoe,* 581 F.2d 275 (1st Cir. 1978); *Brown* v. *Culpepper,* 559 F.2d 274 (5th Cir. 1977). Appellees contend, however, that the record here does not establish that this lawsuit was a primary cause of the changes here. They also assert that, because judgment was actually entered against the appellants, they cannot be considered prevailing parties.

Addressing the second argument first, we refuse to give conclusive weight to the form of the judgment. In assessing who is a prevailing party, we look to the substance of the litigation's outcome. If the new procedures, which provided much of the relief appellants had initially sought, were implemented as a result of this lawsuit, the appellants were prevailing parties with respect to a portion of their claims (which claims were thereby effectively mooted) irrespective of the judgment entered against them on the balance of their claims.[9]

This brings us back to the appellees first argument that there is no record basis for concluding that the new procedures were, in fact, implemented as a result of this litigation. At the hearing held below on the attorney's fees issue, no evidence was presented on the causal relationship between the suit and the implementation of the new procedures, although the district judge recognized that this litigation was "at least . . . a contributing factor" in the bringing about of these procedural changes. In a situation such as this where the chronology of events strongly suggests such a causal relationship, we hold that a district court must conduct an inquiry to determine whether the lawsuit was the catalyst for the implementation of all or any of the reform measures. This task is complicated by the numerous modifications made by New Jersey during the course of this litigation.

---

[9] *But see, Taylor* v. *Safeway Stores, Inc.,* 524 F.2d 263, 273 (10th Cir. 1975) (even if named plaintiff could show that this suit was a catalyst for the defendant employer's change in employment policies, he would not be entitled to attorney's fees under 42 U.S.C. § 2000e-5(k) because he did not prevail on any of his individual or class claims).

Appendix A

Appellants are only entitled to attorney's fees for the time spent on the claims on which they have "essentially succeeded." *See Hughes* v. *Repko,* 578 F.2d 483, 487 (3d Cir. 1978). Of course, the district court has some discretion to refuse attorney's fees even to prevailing parties. This, however, should not be done unless there are "special circumstances." *See Skehan* v. *Board of Trustees of Bloomsburg State College,* Nos. 77-2311 & 77-2312 (3d Cir. Dec. 21, 1978). Some courts have held that fees can only be obtained where the plaintiff's claims were "substantial" or not frivolous." *See Gagne* v. *Maher, supra; Nadeau* v. *Helgemoe, supra.* Since appellants' claims certainly pass any such test it is unnecessary to define exactly what, if any, threshhold standard must be met.

4. Conclusion

We will therefore affirm the entry of judgment against the appellants, but will remand to the district court for further inquiry, in accordance with this opinion, into whether attorney's fees should be awarded and, if so, in what amount.

To the Clerk:

Please file the foregoing opinion.

Circuit Judge

Dated:

Appendix A

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 78-2260

Anna Ross, Joyce Norkett, and Charles Thomas, individually and on behalf of all other persons similarly situated,

Appellants,

vs.

John Horn, Commissioner Division of Employment Security, Department of Labor and Industry of the State of New Jersey, William J. Kristjen, Manager, Central Newark Unemployment Insurance Claims Office of the Division of Unemployment and Disability Insurance of the Department of Labor and Industry of the State of New Jersey, and James A. Ware, Assistant Commissioner for Income Security of the Department of Labor and Industry of the State of New Jersey

(D. C. Civil No. 74-0818)

On Appeal from the United States District Court for the District of New Jersey

Appendix A

Present:

GIBBONS and HIGGINBOTHAM, *Circuit Judges* and MARKEY*, *Chief Judge,* United States Court of Customs and Patent Appeals

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on March 20, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, filed May 24, 1978 and July 28, 1978, be, and the same are hereby affirmed except as to the denial of an award of attorneys' fees. That part of the cause is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

May 25, 1979

---

* Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

APPENDIX B

Oral Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil No. 74-818

ANNA ROSS, JOYCE NORKETT, and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

JOHN HORN, COMMISSIONER, Divsion of Employment Security, Department of Labor and Industry of the State of New Jersey, WILLIAM J. KRISTJEN, MANAGER, Central Newark Unemployment Insurance Claims Office of the Division of Unemployment and Disability Insurance of the Department of Labor and Industry of the State of New Jersey, and JAMES A. WARE, ASSISTANT COMMISSIONER for Income Security of the Department of Labor and Industry of the State of New Jersey,

Defendants.

Trenton, New Jersey
July 17, 1978

Appendix B

Before:

The Honorable Geobge H. Barlow, USCJ

Appearances:

Richard S. Semel,
For the Plaintiffs

Michael S. Bokar,
Deputy Attorney General
For the Defendants

The Court: Yes, gentlemen.

I am satisfied, Mr. Semel, to begin with, in terms of retaining jurisdiction, it seems to me rather silly if every case I try in which a matter involving the State or indeed involving any other party is resolved against one party, you ask me to retain jurisdiction to be sure the regulations are not changed or some change does not occur, and that would defeat the success you have gained thus far.

While it is true, as I have indicated to you, that institution of your suit originally inspired, if that it the occasion, the Government to review its regulations and to redraft them in a manner that would not offend either the Constitution or the controlling statutory law, but it cannot be said you were the prevailing party in this case, because by the time we got to this case, as you well know, the regulations were changed, and indeed the regulations change from day to day. So that I addressed myself to the regulations as they existed at the time of trial and found them to be in full compliance with both statutory and constitutional provisions in question.

Appendix B

Under those circumstances, I have to deny your application. I certainly can't amend my order of dismissal expressing some dicta to the effect that the original state of the regulations was unconstitutional. It would be meaningless. And I didn't do it, of course, in the final judgment of this Court nor the opinion supporting the final judgment.

Accordingly, the application to amend the dismissal is denied. The application to retain jurisdiction is also denied and the application for costs and counsel fees is also denied.

Mr. Semel: Thank you, your Honor.

APPENDIX C

Order of the United States District Court for the District of New Jersey

(Filed—July 28, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 74-818

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, etc.,

Plaintiffs,

v.

JOHN HORN, Commissioner, Division of Employment Security, etc., *at al.*,

Defendants.

ORDER

This matter having been brought before the Court on July 3, 1978 on motion by the plaintiffs for an order amending the order entered by the Court on May 24, 1978 in several particulars, to wit, a declaration that the current New Jersey Regulations satisfy the statutory and constitutional challenges raised in the complaint and may not be revoked or amended, an award of attorneys' fees

and court costs to the plaintiffs, and the retention of jurisdiction by this Court for a period of at least two years, with Richard S. Semel, Esquire appearing for the plaintiffs and Michael S. Bokar, Deputy Attorney General appearing for the defendants, and the Court having considered the motion papers, briefs and arguments of counsel,

IT IS, on this 28th day of July, 1978 ORDERED that the motion by plaintiffs is hereby denied.

s/ GEORGE H. BARLOW
Chief Judge

APPENDIX D

Order of the United States District Court for the District of New Jersey

(Filed—May 24, 1978)

UNITED STAES DISTRICT COURT

DISTRICT OF NEW JERSEY

Civil Action No. 74-818

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, etc.,

Plaintiffs,

v.

JOHN HORN, Commissioner, Division of Employment Security, etc., *at al.*,

Defendants.

ORDER

This matter having been tried before the Court without a jury, Richard S. Semel, Esquire, appearing for the plaintiffs and Michael S. Bokar, Esquire, appearing for the defendants, wherein the plaintiffs seek injunctive and declaratory relief, and

It appearing that the plaintiffs have failed to prove the allegations of the amended complaint by a preponderance of the evidence,

Appendix D

IT IS, on this Twenty-fourth day of May, 1978, ORDERED that judgment shall enter in favor of the defendants and against the plaintiffs for the reasons expressed in this Court's opinion-letter filed even date therewith. No costs.

s/ GEORGE H. BARLOW
Chief Judge

Supreme Court, U. S.
FILED
NOV 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-297

JOHN J. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, WILLIAM J. KRISTJEN, MANAGER, CENTRAL NEWARK UNEMPLOYMENT INSURANCE CLAIMS OFFICE OF THE DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, AND JAMES A. WARE, ASSISTANT COMMISSIONER FOR INCOME SECURITY OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY,

Petitioners,

v.

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

RICHARD S. SEMEL,
Attorney for Respondents,
47 Essex Street,
Hackensack, New Jersey 07601.
(201) 487-2166

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
1. There is no conflict between the decision of the Circuit Court of Appeals and the cases relied upon by the petitioner	4
2. This case is not ripe for consideration	7
CONCLUSION	7
APPENDIX:	
A—Letter Opinion of Judge Barlow, dated February 5, 1975	1a
B—Transcript of Argument on Motion to Amend Order of Dismissal	6a

Cases Cited

American Construction Co. v. Jacksonville, Tampa and Key West Ry. Co., 148 U. S. 372 (1892)	7
Brotherhood of Locomotive Firemen v. Bangor A.R. Co., 389 U. S. 327 (1967)	7
Christiansburg Garment Co. v. EEOC, 434 U. S. 412 (1978)	4
Clanton v. Allied Chemical Corp., 409 F. Supp. 282 (E.D. Va. 1976)	6
Kahan v. Rosentiel, 424 F. 2d 163 (3d Cir. 1970)	6
Nadeau v. Helgemoe, 581 F. 2d 275 (1st Cir. 1978)	5

PAGE

Statute Cited

42 U.S.C.:

Sec. 503(a) 5

Sec. 503(a)(1) 2

Sec. 503(a)(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-297

JOHN J. HORN, COMMISSIONER, DIVISION OF EMPLOYMENT SECURITY, DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, WILLIAM J. KRISTJEN, MANAGER, CENTRAL NEWARK UNEMPLOYMENT INSURANCE CLAIMS OFFICE OF THE DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY, AND JAMES A. WARE, ASSISTANT COMMISSIONER FOR INCOME SECURITY OF THE DEPARTMENT OF LABOR AND INDUSTRY OF THE STATE OF NEW JERSEY,

Petitioners,

v.

ANNA ROSS, JOYCE NORKETT and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Statement of the Case

The Complaint filed on June 4, 1974, alleged that the plaintiffs and the class they represent were denied payment of unemployment compensation benefits when due and an opportunity for a fair hearing, as required by 42 U.S.C. §§503(a)(1) and (3) as the result of the operation of an unwritten policy of the New Jersey Division of Employment Security. Specifically, it was alleged that claimants suspected of, accused of, or indicted for, but not convicted of, receiving unemployment benefits while employed had their applications "pended" for indefinite periods of time. In the case of the original named plaintiffs the periods exceeded 18 months.

In September, 1974, Petitioner promulgated a regulation, Administrative Instruction UIM-451, designed to cure the challenged defect. It required members of the plaintiff class to be provided with pre-determination hearings and to be issued appealable determinations. In November, 1974, the new procedures were applied to the original named plaintiffs, following which Petitioner moved to dismiss the case as moot. The motion was denied for reasons set forth in the trial court's letter opinion of February 5, 1975, a copy of which is included herein as Respondents' Appendix A.

During the next two years, the new regulation was amended, supplemented, and superseded by a second regulation, UIM-490, which was in turn supplemented less than one week before the trial. The forms of notices and determinations used by Petitioner were also revised during this period. The case was tried in January and February, 1977, and a letter opinion filed in May, 1978. In that opinion, the District Court declined to rule on the challenge to the pre-litigation policy:

> "Thus, our only task is to decide whether or not the procedures presently utilized, as we understand them from the testimony and documentary evidence presented at trial, comport with the pertinent federal statutory and constitutional provisions." Letter Opinion of Honorable George H. Barlow, dated May 23, 1978, page 8.

The court went on to determine that the new procedures satisfied the provisions of the above-cited statute. On May 24, 1978, an order was entered dismissing the complaint (Pet. App. D).

Plaintiffs then moved for an order amending the order of dismissal to include a declaration that it was the 1977 New Jersey regulations which the court had found met the statutory and constitutional challenges raised in the complaint, that those regulations could not be revoked or their substantive provisions vitiated by amendment, and awarding costs and counsel fees to the plaintiff class. A portion of the argument on the motion is included in the Petition as Appendix B. The complete transcript is included herein as Respondents' Appendix B. In the course of the argument, counsel for Petitioner acknowledged that the institution of suit had disclosed "substantial defects" in New Jersey's practices and conceded that the litigation did result in "very substantial changes being made" (Resp. App. B, p. 12a). The court too acknowledged the relationship between the suit and the changes.

> "They were changed, as you know, I think specifically, as you suggest, by reason of the suit you brought, or at least that was a contributing factor until they passed statutory and constitutional muster, but I never addressed myself to the impropriety of the original regulation." (Resp. App. B, p. 8a)

Apparently believing that he was foreclosed by his dismissal of the complaint from holding that the plaintiff class had prevailed, Judge Barlow denied the motion (Resp. App. B, p. 9a; Pet. App. C).

In the Third Circuit opinion, Judge Higginbotham has corrected that error, remanding the case to the District Court with instructions to "conduct an inquiry to determine whether the lawsuit was the catalyst for the implementation of all or any of the reform measures." (Pet. App. A, p. 21a).

REASONS FOR DENYING THE WRIT

1. There is no conflict between the decision of the Circuit Court of Appeals and the cases relied upon by the petitioner.

Although the Petition cites several cases and claims that the Third Circuit opinion is inconsistent with those cases, it fails to specify the inconsistency. A reading of the cases cited discloses that the court below followed the cases, to the extent that they are apposite.

Petitioner places principal reliance on the case of *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412 (1978). That case is distinguishable and is not in conflict with the Third Circuit opinion. The issue in *Christiansburg* was the award of counsel fees to a successful defendant. Justee Stewart briefly summarized two policy considerations which support the award of fees to prevailing plaintiff, but which are not present in the case of a prevailing defendant. Those considerations are a judicial finding that the plaintiff is the chosen instrument to vindicate "a policy that Congress considered of the highest priority" and that counsel fees are awarded against a violator of federal law.

Petitioner does not suggest that the plaintiff class was not the proper instrument to enforce the policies established by Congress in 42 U.S.C. §503(a), nor does he suggest that New Jersey's original practices were consistent with that law. By implication, the Third Circuit did find that Petitioner violated federal law. Judge Higginbotham characterized the changes as "reforms," and ended his opinion with an express finding that plaintiffs' claims were "substantial or not frivolous." (Pet. App. A, pp. 21a and 22a). The remand specifically directed the District Court to determine the extent to which the new procedures were implemented as a result of the lawsuit. As the opinion specifically states, only to that extent can the plaintiffs be considered "prevailing" parties, and entitled to counsel fees. The remand will provide the kind of inquiry which the cases require.

There is no conflict between the Third Circuit opinion and the opinion in *Nadeau* v. *Helgemoe,* 581 F. 2d 275 (1st Cir. 1978). Judge Higginbotham not only cited *Nadeau,* but followed the procedure suggested by Chief Judge Coffin, who wrote the opinion.

Nadeau held, with respect to issues resolved by a consent decree, that a plaintiff is entitled to attorneys fees when the lawsuit acts as a catalyst in prompting defendants to take action to bring the challenged practices into conformity with federal law. After specifying the guidelines to be applied by the District Court, the *Nadeau* Court remanded. Judge Higginbotham applied exactly the same principles, and directed the District Court to follow the same process. Both courts made use of the "catalyst" language in deciding the cases. Both gave similar weight to chronology as a basis for inferring that the changes were precipitated by the lawsuits, and both recognized that chronology was not, by itself, decisive. One will search in vain for any inconsistency between the two opinions.

The opinion in *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976) does not add anything of significance. The District Court judge there ordered the same type inquiry as was ordered by Judge Higginbotham, for the same reasons.

The citation in the petition of the Third Circuit opinion in *Kahan* v. *Rosentiel,* 424 F.2d 163 (3rd Cir. 1970) is inapposite, but not in conflict with the opinion below. The case was a stockholder's derivative action, in which fees are based upon the creation or preservation by a party of a fund which benefits others. Petitioner quotes parts of two paragraphs from page 167 of the opinion, emphasizing the requirement that the suit be meritorious. The court below specifically found plaintiffs' claims to be meritorious.

In summarizing his arguments, Petitioner first lists various reasons why New Jersey could have reformed its practices and suggests that the court below erred by predicating the award of counsel fees "solely on the presence of a causal relation between the filing of a suit and subsequent concessions by the defendant, * * *." This the Third Circuit did not do. He then suggests the necessity of an inquiry into the merits of plaintiff's claims, which the court did do. Finally, he completely ignores the fact that the Third Circuit concluded its opinion by remanding and directing the District Court to conduct an inquiry to determine the relationship between the lawsuit and the subsequent reforms. That kind of inquiry is what the cited cases require.

2. This case is not ripe for consideration.

Judge Barlow's comments in the course of the argument on the motion to amend the judgment make it clear that contrary to the requirements of the cases, he neglected to determine whether the September, 1974, and subsequent changes in the New Jersey procedures were motivated by the lawsuit filed in June, 1974.

On remand, petitioner may establish a complete lack of connection between the suit and the changes or that there are some special circumstances justifying no award. The award may be so small as to be *de minimis.* Until the required inquiry has been conducted and an award made, the case is not ready for consideration.

This court has repeatedly held that it will not ordinarily entertain interlocutory appeals, notwithstanding that it has the right to do so. The leading case is *American Construction Co.* v. *Jacksonville, Tampa and Key West Ry. Co.,* 148 U.S. 372, 384 (1892), in which the court held that certiorari should be denied where the order below is interlocutory, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case. *Accord, Brotherhood of Locomotive Firemen* v. *Bangor A.R. Co.,* 389 U.S. 327 (1967).

CONCLUSION

For the reasons set forth above, respondents urge that the writ be denied.

Respectfully submitted,

RICHARD S. SEMEL,
Attorney for Respondents.

[APPENDICES FOLLOW]

APPENDIX A

Letter Opinion of Judge Barlow, dated February 5, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

February 5th, 1975.

Chambers of
GEORGE H. BARLOW
Judge

Federal Building
Trenton, New Jersey 08650

NOT FOR PUBLICATION

Richard S. Semel, Esquire
Bergen County Legal Services
11 Commerce Street
Garfield, New Jersey—07026
(Attorney for Defendant)

Michael S. Bokar, Esquire
Deputy Attorney General
Office of the Attorney General
State House Annex
Trenton, New Jersey—08625
(Attorneys for Defendant)

RE: ANNA ROSS and JOYCE NORKETT, individually and on behalf of all other persons similarly situated v. JOSEPH A. HOFFMAN, Commissioner, Division of Employment Security, Department of Labor and Industry of the State of New Jersey; Civil Action No. 74-818.

Appendix A

OPINION

Gentlemen:

Plaintiffs, Anna Ross and Joyce Norkett, challenge the procedures used by New Jersey unemployment compensation officials in processing "wage-benefit conflict" cases. Plaintiffs are two unemployment claimants who have been denied benefits. Defendant is Joseph A. Hoffman, Commisssioner of the Department of Labor and Industry. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(3) and (4). The case is now before the Court on defendant's motion to dismiss the action as moot or, alternatively, for summary judgment. Also pending is plaintiffs' motion for an order permitting this action to be maintained as a class action. Fed. R. Civ. P. 23(c)(1).

A "wage-benefit conflict" arises when an unemployment claimant fraudulently collects unemployment benefits for periods when he actually was working and earning wages. The two named plaintiffs in the present case allege that they were denied benefits, without a hearing, for lengthy periods of time on the basis of suspected wage-benefit conflicts. While the lawsuit was pending, New Jersey officials agreed to institute, and ultimately adopted, new procedures for processing wage-benefit conflict cases (Administrative Instruction UIM-451).

Under the new procedures, persons whose claims for benefits are denied on the ground of wage-benefit conflicts are entitled to a hearing at which counsel may be present and witnesses may be called. UIM-451 also provides for advance written notice of the fraud charge and, in those cases where the determination is adverse to the claimant, a written statement containing the grounds

Appendix A

for the decision must be prepared. The state agreed to apply these new procedures to the present plaintiffs and to withdraw criminal fraud charges that were contemplated against the plaintiffs. In view of the foregoing, defendant urges that the present case is moot.

Plaintiffs, however, insist that the case is not moot because even the new procedures violate the "fair hearing"[1] and "payment when due"[2] provisions of the Social Security Act, as well as the due process and double jeopardy provisions of the Federal Constitution. Specifically, plaintiffs attack the new procedures on the grounds that: (1) inadequate advance notice of charges is provided; (2) the official presiding at the hearing often is a fraud investigator rather than an impartial examiner; (3) no effective right to confront witnesses is granted; (4) the state has an unwritten policy of suspending benefits for lengthy periods of time prior to the final eligibility determination by the hearing examiner; (5) the Department of Labor and Industry levies substantial fines or penalties without the ordinary protections of the criminal process; and (6) persons fined by the administrative agency still are subject to criminal prosecution for fraud.

If true, plaintiffs' allegations clearly would raise substantial questions concerning the statutory and constitutional validity of the state's new procedures. See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144

---

[1] 42 U.S.C. §503(a)(3).

[2] 42 U.S.C. §503(a)(1).

(1963); *Pregent* v. *New Hampshire Dept. of Employment Security,* 361 F. Supp. 782 (D.N.H. 1973) (3-Judge Court), vacated and remanded for consideration of mootness, 94 S. Ct. 2595 (1974). We are unable to resolve these questions merely by analyzing the text of UIM-451. In these circumstances, we cannot find that UIM-451 has rendered plaintiffs' action moot.[3] Similarly, summary judgment is inappropriate because plaintiffs' contentions raise factual issues which are disputed by the parties. Fed. R. Civ. P. 56(c); see *Clyde* v. *Hodge,* 413 F. 2d 48, 51 (3d Cir. 1969).

Further, the Court declines, at this time, to decide the plaintiffs' motion for an order permitting this case to proceed as a class action. The first prerequisite to a class action is that the class be "so numerous that joinder of all members is impracticable". Fed. R. Civ. P. 23(a)(1). The burden of showing that joinder is impracticable is on the party instituting the class action. *Cash* v. *Swifton Land Corp.,* 434 F. 2d 569, 571 (6th Cir. 1970); *Tuma* v. *American Can Co.,* 367 F. Supp. 1178, 1188 (D.N.J. 1973). Here, plaintiffs apparently would seek to represent a class of persons whose claims for unemployment benefits have been denied pursuant to the UIM-451 procedure.[4] Plain-

[3] Plaintiffs, we suggest, should file an amended complaint reflecting the procedural changes that have occurred since the filing of the initial complaint and to which they are now subject pursuant to the state's agreement.

[4] In their moving papers, plaintiffs purport to represent *all* recipients of unemployment benefits, apparently on the theory that any recipient potentially is subject to the UIM-451 procedure. The Court cannot authorize such a broad class. Where all members of a proposed class have not suffered from the alleged illegal conduct, there can be no questions of law or fact common to the entire class, as required by Fed. R. Civ. P. 23(a)(2). *See* 7 Wright & Miller, *Federal Practice and Procedure,* §1763, at p. 609. Moreover, there would be no "case or controversy" as to those members of the class who had suffered no wrong.

tiffs have made no showing as to the size of this class. The class may, in fact, be quite limited in number because UIM-451 was not instituted until October 17th, 1974.

Since there is a distinct possibility that this case can be properly resolved on plaintiffs' statutory claims, this Court will not request the convening of a three-judge court. See *Hagans* v. *Lavine,* 415 U.S. 528, 543-45 (1974).

Accordingly, defendant's motion to dismiss or, alternatively, for summary judgment, is denied. Plaintiffs' motion for an order permitting this action to proceed as a class action is also denied, without prejudice. An appropriate order will be submitted.

Very truly yours,

GEORGE H. BARLOW
United States District Judge

GHB/ebj

APPENDIX B

Transcript of Argument on Motion to Amend Order of Dismissal

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil No. 74-818

ANNA ROSS, JOYCE NORKETT, and CHARLES THOMAS, individually and on behalf of all other persons similarly situated,

Plaintiffs,

vs.

JOHN HORN, COMMISSIONER Division of Employment Security, Department of Labor and Industry of the State of New Jersey, WILLIAM J. KRISTJEN, MANAGER, Central Newark Unemployment Insurance Claims Office of the Division of Unemployment and Disability Insurance of the Department of Labor and Industry of the State of New Jersey, and JAMES A. WARE, ASSISTANT COMMISSIONER for Income Security of the Department of Labor and Industry of the State of New Jersey,

Defendants.

Trenton, New Jersey
July 17, 1978

Appendix B

Before The Honorable GEORGE H. BARLOW, USCJ

Appearances:

RICHARD S. SEMEL,
For the Plaintiffs

MICHAEL S. BOKAR,
Deputy Attorney General
For the Defendants

HEARING ON DEFENDANTS' MOTION TO AMEND CERTAIN ORDER OF DISMISSAL

Pursuant to Section 753, Title 28, United States Code, the following transcript is certified to be an accurate record as was stenographically in the above entitled proceedings.

HELEN C. JOHNSON
Court Reporter

Mr. Semel: The purpose of this motion initially was to request the Court to enter declaratory judgment embodying findings of fact and conclusions of law specifically to prevent the State from vitiating the effect of your opinion by either revoking the regulations which you found were now complied with the statute or vitiating them in some way by amendment.

Subsequently I have come across the case of *Parham* v. *Southwestern Telephone* cited in my supplemental brief which might provide the same remedy. That would be for the Court to retain jurisdiction of this case.

The Court: Forever?

Mr. Semel: That is an indication the Court did not answer in the *Parham* decision, but I would guess a period of another two years would be satisfactory.

The Court: I don't understand. You lack such confidence in the State of New Jersey. You think after—I didn't really tell them, as you recall, in this case the regulations were challenged in midstream, so I never fully addressed the original regulations. They were changed, as you know, I think specifically, as you suggest, by reason of the suit you brought, or at least that was a contributing factor until they passed statutory and constitutional muster, but I never addressed myself to the impropriety of the original regulation.

Are you concerned now, after finding that the current regulations are acceptable, the State government is now going to change and go back to the old regulation?

Mr. Semel: I am concerned about the possibility of further changes in the regulation, yes, the reason being, your Honor will recall that only one regulation was ever published in the New Jersey Register, and that was the original regulation which was promulgated, I believe, in September of 1974, immediately prior to the motion to dismiss the case on the grounds that it was moot. That regulation was not published until the following July, if I am not mistaken, and not in exactly the same form. That regulation has been changed a number of times, the latest time being the 27th of January, immediately preceding the trial of the case, and yet up to this date neither the changed regulations nor the subsequent amendments to the regulations have ever been published in the New Jersey Register, which means only people who are incidentally familiar with this arrangement and have access to Exhibit P-1, which was the book of regulations kept ordinarily in the local manager's office at the Unemployment local offices of employment, will have any way of determining those regulations exist or what their conditions are in six months from now or a year or two years from now.

I could, I suppose, go to the manager's office every few months and ask to look at the regulations.

You may recall also that the numbering system is virtually at random. No way to determine what regulation pertains to a particular subject. There is no index, and I think it is very possible that after—

The Court: Given all of that, what difference does it make whether I retain jurisdiction? If you determine that is a violation, file another lawsuit.

Mr. Semel: If I have another plaintiff. You recall the class in this case consisted of some 700-odd people or more, possibly as many as 2500 people, and yet we were never able to determine in any detail the identities of these people. And to require the outcome of an issue to depend on the fortuity of some individual walking into my office or some other legal services office or some other attorney's office who is knowledgeable in this area, it seems to me is, as a means of remedy, unnecessary.

The Court: Yes.

Anything further?

Mr. Semel: As far as the remainder of the case is concerned, I believe under the cases I have cited and under the statute, the plaintiffs are in fact the prevailing party. Therefore, they are entitled to costs, which I have set forth in my initial affidavit as being necessary.

The Court: How can you suggest that you were the prevailing party in this case? I agree I might concede starting a lawsuit might have impaneled the State of New Jersey to change regulations to avoid what may have been some imperfections in its original regulations. You

may have inspired those changes, but the judgment of the Court was directly contrary to your application, finding the government regulations, State regulations were valid.

Mr. Semel: The regulations as they existed as of the date of the trial in January and February of 1977, but not at the time the suit was started. At the time, if you recall, you found just the opposite.

The Court: That was on an application for a summary judgment.

Mr. Semel: Yes, based on the assertion that the UIM 451, which was the basic regulation and one basically still in effect, has changed the situation so drastically the suit should be dismissed. You found otherwise. Indeed, you found the regulation in existence originally did not apply to everybody who was entitled to a hearing under the wage benefit conflict statute or under the policy. It was only after the suit was started and after the State recalled all of these cases and after they expanded their regulations to give the benefits of the statute to everybody that you finally concluded at the end of the case that the State regulations as no exist provided the constitutional and statutory protections. And again I would like to remind your Honor it wasn't until January 27, which was less than ten days before the suit was started, the State promulgated regulations to tell its fraud investigators and the hearing officers that this regulation applied to them.

In the context of the suit, this suit was the catalyst which caused the amendment of the regulations. But for the institution of this suit, we would be back where we were in 1974, when Mrs. Ross had to wait from April 1973 until November 1974 after the regulations were promulgated to have a hearing, where Mrs. Norkett had

to wait the same period of time. Had it not been for the institution of that suit, those ladies might never have had a hearing, and Mr. Thomas, the other named plaintiff, didn't get a hearing at all, even though the regulations were in effect, and they did apply to him.

In the view of the courts and Congress in promulgating the attorney's civil rights act, attorney's fee act, this case, although you did enter an order dismissing the complaint, nevertheless I believe the plaintiff class was the prevailing party.

The Court: Do you wish to address yourself to this?

Mr. Bokar: My remarks will be very brief.

First of all, there is absolutely no evidence that the named plaintiffs did not have a hearing even under the old procedure. I call your Honor's attention to your Honor's opinion at page 4, where you note as early as March 1972 administrative instructions of the Department of Labor and Industry did require the holding of a hearing in wage benefit conflict cases. However, as the result of the institution of this lawsuit, the Attorney General's Office reviewed those early procedures and determined that they did indeed contain defects and substantial defects, one of which is that following the hearing required under the old procedure as early as March 1972, there were no required findings of fact and conclusions of law, in other words no determination was required to be issued following that hearing. And it was as the result of that review by the New Jersey State Attorney General's Office and the determination that defects such as those existed that changes were made. Of course, it is true, and we conceded it quite explicitly, that this litigation did result in very substantial changes being made. But the purposes of this motion, to say in fact there is no evidence at all that the Department of Labor and Industry of the Attor-

ney General's Office has any inclination at all to return to the old procedures, the fact is, your Honor, so long as I have a say in the matter, there will no reversion to the old procedures, and does the Court have the authority to issue declaratory and injunctive relief of the kind asked for by the plaintiff? Of course it does.

I suppose if there was evidence brought to the Court's attention that the State was planning to revert, the Court might entertain such a motion, but the fact is there is no such intention, no evidence of such intention.

On the attorenys' fees and costs, court costs, of course the governing decision now is the recent decision of the United States Supreme Court in *Hutto* v. *Finney,* 46 Law Week, 4817, a decision handed down June 3, 1978.

The Court of course there pointed to the fact that attorneys' fees may be awarded and court costs may be awarded against the State and State officials in favor of the prevailing party to litigation. The key words there are may and the discretion of the court and prevailing party.

Your Honor has already indicated, and of course we concur there is no indication at all from reading the Court's opinion that Mr. Semel represents the prevailing party. Beyond that the Supreme Court indicated in that case that it may be appropriate to award such fees and costs because where the State, following the issuance of an injunction against a State official or the State fails in bad faith to comply with the court's injunctive order, the Court indicated in that situation also it might be appropriate to award such costs and fees, but we have neither situation here, and for those reasons we submit the motion should be denied.

The Court: Yes, gentlemen.

I am satisfied, Mr. Semel, to begin with, in terms of retaining jurisdiction, it seems to me rather silly if every case I try in which a matter involving the State or indeed involving any other party is resolved against one party, you ask me to retain jurisdiction to be sure the regulations are not changed or some change does not occur, and that would defeat the success you have gained thus far.

While it is true, as I have indicated to you, that institution of your suit originally inspired, if that is the occasion, the Government to review its regulations and to redraft them in a manner that would not offend either the Constitution or the controlling statutory law, but it cannot be said you were the prevailing party in this case, because by the time we got to this case, as you well know, the regulations were changed, and indeed the regulations change from day to day. So that I addressed myself to the regulations as they existed at the time of trial and found them to be in full compliance with both statutory and constitutional provisions in question.

Under those circumstances, I have to deny your application. I certainly can't amend my order of dismissal expressing some dicta to the effect that the original state of the regulations was unconstitutional. It would be meaningless. And I didn't do it, of course, in the final judgment of this Court nor the opinion supporting the final judgment.

Accordingly, the application to amend the dismissal is denied. The application to retain jurisdiction is also denied and the application for costs and counsel fees is also denied.

Mr. Semel: Thank you, your Honor.